IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

NEW YORK HANDKERCHIEF MFG. CO.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved.

A judgment dismissing petitioner's complaint was entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, on January 4, 1943 (R., p. 29). Said judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on April 25, 1944 (R., p. 43). Petitioner prays that a writ of certiorari issue to review said judgment.

On August 9, 1937, petitioner filed with the office of the Collector of Internal Revenue, First District of Illinois, a claim for the refund of $3,654.30 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act of 1933 (R., pp. 11-19). Since the claim was not filed prior to July 1, 1937 as required by Section 903 of the Revenue Act of 1936, it was rejected by the Commissioner of Internal Revenue on May 26, 1938 (R., p. 19). Subsequently, Congress enacted Section 405 of the Revenue Act of 1939 which extended the time for filing claims under Title VII of the Revenue Act of 1936 to December 31, 1939. Thereafter, the Commissioner, in a letter dated November 16, 1939, notified the petitioner that its claim for refund would be treated as a claim timely filed within the meaning of Section 903 of the Revenue Act of 1936 as amended, and would be re-opened for consideration on its merits (R., pp. 20-21). The Commissioner, on February 1, 1940, wrote to petitioner requesting additional evidence (R., pp. 21-22). On April 13, 1940, petitioner wrote the Commissioner, under oath, that the records requested were not available since they had been destroyed because petitioner did not have adequate space to maintain them over so long a period (R., p. 24). On May 4, 1940, petitioner was notified that its claim for refund had been rejected on the ground that the evidence submitted by it in support thereof, failed to establish, as required by Section 902 of Title VII of the Revenue Act of 1936 and Regulations 96, that the plaintiff had borne the burden of the taxes, refund of which was claimed (R., pp. 24-25).

On May 1, 1942, petitioner instituted suit in the United States District Court for the refund of the floor stocks taxes paid as aforesaid (R., pp. 2-7). The respondent moved to dismiss the complaint on the grounds, (1) that under Section 903 of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96, the court did not have jurisdiction of the action because petitioner submitted no evidence

in support of its claim for refund and (2) that the action was barred by Section 904 of the Revenue Act of 1936 under which petitioner had two years from May 26, 1938 to commence this action (R., pp. 8-9).

The District Court granted the motion to dismiss, without opinion (R., p. 29). The Circuit Court affirmed the judgment of the District Court on ground (1), not ruling on ground (2) for the reason that upon oral argument respondent's counsel stated that said point was without merit (R. p. 45).

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A., Section 347; and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented.

The questions herein presented are:

1. Do Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939, and the provisions of Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31)?

2. Does petitioner's claim for refund comply with Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939 and Regulations 96?

3. Does the District Court have jurisdiction of the action?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1941). The latter case also involved a claim for refund under Title VII of the Revenue Act of 1936 of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31) and dealt with the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence.

The instant decision is also in conflict with the following decisions of United States District Courts in the Third, Fourth, Fifth and Ninth Circuits:

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

2. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is likewise in direct conflict with the following decisions of the Circuit Court of Appeals for the Fifth and Sixth Circuits:

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933) (Revenue Act of 1926, Sec. 1113 [a]; Reg. 69, Art. 1304).

These cases involved claims for refund under other but similar statutes on the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence. The authority for analogy to the latter is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2, pp. 699-700).

The Circuit Court in the within matter in the course of its opinion (R., p. 45) found, as contended by plaintiff, that the regulations concerned in the last two mentioned cases, which are similar to those here involved, do not require that the evidence on which the claimant relied be presented to the Commissioner.

The instant decision is also in conflict with the following decision of the United States District Court in the Sixth Circuit involving the same issue:

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925).

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important and substantial question of federal law which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, "that this court is without jurisdiction of the matters and things of which the plaintiff complains, and is without jurisdiction to render judgment in favor of plaintiff and against defendant * * *" (R., p. 8) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction,

has ruled, in effect, by its affirmance of the dismissal of the complaint that the District Court had no jurisdiction of the action. This question of jurisdiction of the District Court, it is submitted, is of utmost importance and should be settled by the Supreme Court.

Further, there are many hundreds of cases such as the instant one still pending in the Federal District Courts. Recovery will be denied claimant in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8335, *New York Handkerchief Mfg. Co., Appellant* v. *The United States of America, Appellee*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this court, and for such further relief as this court may seem proper.

Dated, July 6, 1944.

DAVID SILBERT,
Counsel for Petitioner.